CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 56/12
[2013] ZACC 2

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

MEIR ELRAN Respondent

Heard on : 15 November 2012

Decided on : 19 February 2013

JUDGMENT

JAFTA J (Moseneke DCJ, Nkabinde J and Yacoob J concurring):

Introduction

[1] The interpretation and application of section 44 of the Prevention of Organised Crime Act[1] (POCA) is at the heart of this application for leave to appeal. The National Director of Public Prosecutions (NDPP) seeks leave to appeal against the judgment of the

[1] 121 of 1998.

Full Court of the South Gauteng High Court, Johannesburg (Full Court) which dismissed the NDPP's appeal with costs. The NDPP had appealed against an order that directed her to pay legal costs incurred by Mr Meir Elran (respondent) from property held in terms of a preservation of property order.

[2] POCA authorises a High Court to grant a preservation order in respect of property believed on reasonable grounds to be proceeds or instrumentalities of criminal offences.[2] An order of this kind preserves property to which it applies until a forfeiture order is granted, a request for forfeiture is refused or the preservation order lapses.[3] The effect of a preservation order is that no one may deal in any manner with property forming the subject matter of the order unless authorised by the High Court which has issued the order.

[2] Section 38(2) of POCA provides:

> "The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned—
>
> (a) is an instrumentality of an offence referred to in Schedule 1; or
>
> (b) is the proceeds of unlawful activities; or
>
> (c) is property associated with terrorist and related activities."

[3] Section 40 of POCA provides:

> "A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the *Gazette* unless—
>
> (a) there is an application for a forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order;
>
> (b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or
>
> (c) the order is rescinded before the expiry of that period."

[3] In terms of section 44 of POCA, a High Court may permit payment of reasonable living and legal expenses from the property that is subject to a preservation order.

Facts and litigation history

[4] On 6 March 2006 the NDPP obtained an order that preserved property of the respondent. The order was, however, not confined to the property described in it but covered "any other property held by [the respondent], whether in his own name or not, including funds transferred from South Africa to any overseas account." This order required the respondent to surrender his entire estate to a curator bonis. The order authorised any person affected by it to approach the Court that granted it for its reconsideration, provided the NDPP and other parties mentioned in the order are given notice of no less than 72 hours. The preservation order afforded any party intending to oppose forfeiture of property to the State, 14 calendar days within which to deliver a notice of opposition to the NDPP.

[5] The respondent delivered to the NDPP and lodged at the High Court the notice to oppose forfeiture. He then asked the curator bonis to provide him with reasonable living and legal expenses. In response the curator demanded to be furnished with certain information. The respondent submitted the information but the curator was not satisfied by it. The curator pointed out that payment for expenses in question would be considered once further information was submitted. This information related to a sale agreement in

respect of the respondent's shares in the Mackenna Game Farm and the paperwork on Body Rush LLC in which the respondent held half of the shareholding.

[6] Meanwhile the NDPP launched forfeiture proceedings in July 2006. The respondent is yet to file opposing papers in those proceedings. Apparently the delay has been caused by the curator's failure to pay for legal expenses.

[7] The respondent instituted an application in the High Court seeking payment of his monthly living expenses and a sum of R250 000 for legal fees. The NDPP opposed it. In a judgment delivered in March 2007, the application was dismissed on technical grounds. An appeal was not pursued because the respondent could not pay legal fees.

[8] The respondent engaged new attorneys and instituted a fresh application for the same relief, except that he excluded the claim for living expenses. The second application was launched in June 2009. In support of the claim for legal expenses, the respondent relied on the affidavits which were used in the earlier, unsuccessful application. These affidavits set out in detail his financial position as it was in 2006. The respondent averred that he had acquired no assets since the date of the preservation order.

[9] In opposing this application, the NDPP disputed the need for the relief claimed and raised a number of defences. First, the NDPP contended that the respondent has property that is not subject to the preservation order and from which he could meet the legal

expenses. In support of this leg of the defence, the NDPP relied on inferential reasoning. The NDPP pointed out that the respondent had been able to support himself and his family for a period of three years since the preservation order was granted. With reference to the respondent's monthly living expenses, which were estimated at R100 000, it was claimed that he could not afford these expenses without a substantial source of income, which he has failed to disclose.

[10] Second, the NDPP asserted that the respondent had failed to make a full disclosure of his interest in property. Specific reference was made to the following:

> "R5.4 million received by the [respondent] as part payment of the full purchase price of R12.5 million for the sale of his shares in Mackenna Game Farm. Approximately R1.7 million deposited into the account of SA Homestead during the period June 2005 and January 2006, with the [respondent] being the only signatory on the account. Foreign transfers amounting to $22 000, transferred by the [respondent] to various bank accounts in Israel, one of which is in the name of 'Ben Hamo', the original name of the [respondent] prior to his name change. Approximately R1.1 million transferred into the bank account of Daria Bachta's, the [respondent's] wife."

[11] Third, the NDPP contended that the respondent failed to provide a sworn and full statement of his assets and liabilities. She pointed out that the respondent had attached to his founding affidavit a list of liabilities only, which excluded assets and that list, it was contended, did not constitute a sworn statement as required by the relevant provision of POCA.

[12] Fourth, the NDPP submitted that the application should be dismissed on the ground that the respondent failed to comply with the preservation order which required him to continue making monthly payments under the mortgage bond he held at the time the order was made. It was also stated that in non-compliance with clauses 10 and 14 of the preservation order, the respondent failed to repatriate these properties: 1 000 shares in Ciena valued at approximately R18 000; 300 shares in Oracle valued at approximately R25 000; half of the shares in Body Rush LLC, the value of which was about R1.6 million; and an amount of approximately $8 000 transferred to the account of one Ben Hamo.

[13] Regarding the assertion that he had property not covered by the preservation order, the respondent replied as follows:

> "I reiterate that since the granting of the preservation order in March 2006 I have not been in a position to pay my living and legal expenses and have been forced to live on loans and charity from friends and family. All my bank accounts have been frozen and all my worldly assets have been placed under preservation. The preservation order is all-encompassing and includes all and any property held by me. . . . I am not in a position to meet my living and legal expenses and since March 2006 I have lived off loans and charity from my friends and family. . . . The living expenses detailed in my founding affidavit relate to the living expenses which were incurred by me prior to the granting of the preservation order. As a result of the preservation order I have been unable to pay my monthly living expenses and have had to drastically reduce same. I cannot afford to make payments of the amounts due in respect of my home loan and have fallen into arrears in respect of water and electricity, rates and taxes, maintenance obligations and other monthly expenses. I am in dire financial straits as a result of the preservation order."

[14] Dealing with the allegation of incomplete disclosure of interest in the property referred to above, the respondent stated:

> "[The NDPP] has frozen all bank accounts held by me and by the entities referred to in the preservation order. I do not possess any funds other than those standing to my credit in my personal bank accounts which were attached by [the NDPP]. My name is not and never was Hamo. I reiterate that I am not possessed of any funds. I have, in any event, provided [the curator bonis] with details of receipt of R5.4 million as well as details as to what I have done with the money."

The allegation about the R5.4 million is elaborated on in an affidavit deposed to by the respondent in June 2006.

[15] Regarding the accusation that he failed to submit a sworn statement of his assets and liabilities, the respondent drew attention to two affidavits deposed to by him. One was dated 3 May 2006 and the other 15 June 2009. Both were annexed to his founding affidavit. These affidavits set out in detail the respondent's assets and liabilities.

[16] With regard to the failure to comply with the preservation order, the respondent admitted that he had not made the monthly payments in terms of the housing loan agreement but pointed out that he was unable to do so because all his assets were subject to the preservation order. He also conceded that the shares in the United States of America had not been repatriated. The reason given for this was that he could not bring

those shares to South Africa without travelling to the United States of America. Apparently he was unable to travel due to restrictions imposed as a result of criminal charges brought against him. But he gave the curator permission to bring the shares in question to South Africa and take necessary steps to recover his shares in Body Rush LLC.

[17] In the Court of first instance, this application was heard by Rosenberg AJ. The learned Judge rejected the defences raised by the NDPP, following her interpretation of section 44 of POCA through the prism of the Constitution. She was satisfied that the respondent had met the requirements of the section. She ordered the curator to pay taxed legal fees to the respondent's attorneys.

[18] Dissatisfied with the outcome, the NDPP appealed to the Full Court. The NDPP contended that the Court of first instance ought not to have been satisfied that the respondent had disclosed his interests in the relevant property and that he had submitted to the Court a full sworn statement of his assets and liabilities. The Full Court examined the affidavits on record and concluded that there was sufficient evidence to support the finding that the respondent had met the requirements of section 44. It dismissed the appeal but amended the order that was granted by the Court of first instance to authorise payment of legal expenses in respect of the forfeiture proceedings only.

Leave to appeal

[19] Counsel for the respondent argued that the matter does not raise a constitutional issue. He submitted that it concerns a determination of facts with a view to establishing whether the respondent has made out a case for the relief sought. This argument cannot be upheld. Clearly the matter raises a constitutional issue. It involves the application and the interpretation of section 44 of POCA. In the context of this case, the section implicates the exercise of the right to legal representation, one of the important basic rights entrenched in the Bill of Rights. Moreover, the interpretation of the section must comply with section 39(2) of the Constitution.[4]

[20] As the matter raises an issue of importance which is likely to arise frequently in the future, it is in the interests of justice that this Court determine the correct construction of section 44. Until now the section has not been considered by this Court or the Supreme Court of Appeal. A decision of this Court will provide guidance to those who implement POCA and the courts applying it. Accordingly, leave must be granted.

Issues

[21] The main issue is whether the Full Court was right in refusing to interfere with the order granted by the Court of first instance, following the exercise of a discretion

[4] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

conferred on it by section 44 of POCA. The determination of this issue involves establishing: (a) the nature of the discretion that was exercised; (b) circumstances under which the exercise of that discretion may be overturned on appeal; and (c) whether those circumstances exist here. At the heart of these issues lies the interpretation of section 44 of POCA. It is convenient to begin with the construction of that section.

Approach to interpreting section 44

[22] At the outset we must remind ourselves of the nature of the legislation we are concerned with. POCA was enacted in pursuit of legitimate and important government purposes of combating serious organised crime and preventing criminals from benefiting from the proceeds of their crimes. Among the arsenal of tools employed to achieve these objectives is the authorisation of seizure of property and restraint orders. These orders authorise state officials to seize property suspected to be the proceeds of crime or an instrumentality of an offence.

[23] Any person whose property is subject to a restraint or preservation order is precluded from dealing with the property in any manner other than the one permitted by the Court.[5] An application for a preservation order like the one we are concerned with

[5] Section 38 of POCA provides:

> "(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
>
> (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned—

here is made to the High Court without any notice to the person whose property is to be seized and preserved. Notice is given only when the order is served upon the property owner. By then the owner might, as is the position in the present case, be divested of his entire estate, without any allowance for his immediate financial needs and those of his family. Clearly this is a draconian intrusion into the rights of those people who are affected by POCA orders.

[24] There can be no doubt that POCA is meant to serve as an effective tool in the fight against crime. But at the same time it authorises a serious erosion of the rights contained in the Bill of Rights, the cornerstone of our democracy. This is done merely on the basis of a reasonable belief that the property targeted was involved in the commission of crime or was its proceeds. It was in this context that in *Fraser v Absa Bank Ltd (National Director Of Public Prosecutions as* Amicus Curiae)[6] this Court observed:

> "[POCA] could however also have potentially far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and values protected in the Constitution."[7]

(a) is an instrumentality of an offence referred to in Schedule 1; or

(b) is the proceeds of unlawful activities.

(3) A High Court making a preservation of property order may, when it makes the order or at any time thereafter, make any ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order, including an order authorising the seizure of the property concerned by a police official.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order."

[6] [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

[7] Id at para 46.

[25] In an attempt to soften the blunt effect it has on fundamental rights, POCA makes allowance for payment of living and legal expenses from the seized assets during the currency of the preservation order. However, these expenses which must be reasonable are not given merely upon request. The applicant must meet certain requirements. I will return to these requirements when interpreting section 44 below.

[26] What is important at this stage is to point out that the failure to meet these requirements would result in the request being refused. The refusal may have far-reaching consequences for those whose property is subjected to a preservation order. The risk is increased by orders like the present, which covered the entire estate of the respondent. It will be recalled that ultimately the State would be entitled to a forfeiture order only to the extent the respondent in this case has benefited from criminal activities and no further.[8]

[8] Section 50 of POCA provides:

> "(1) The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned—
>
> (a) is an instrumentality of an offence referred to in Schedule 1; or
>
> (b) is the proceeds of unlawful activities.
>
> (2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order.
>
> (3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order.
>
> (4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.
>
> (5) The Registrar of the Court making a forfeiture order must publish a notice thereof in the *Gazette* as soon as practicable after the order is made.
>
> (6) A forfeiture order shall not take effect—

[27] Since the purpose of section 44 is to ameliorate the adverse effect of a preservation order by, among others, promoting the exercise of the right to legal representation, it must be construed in a manner that promotes the spirit, purport and objects of the Bill of Rights as obligated by section 39(2) of the Constitution. Preference must be given to a construction of section 44 that advances the exercise of the right to legal representation as opposed to an interpretation that frustrates the exercise of this right. In this regard this Court said in *Fraser:*

> "When interpreting legislation, a Court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation." (Footnotes omitted.)[9]

Meaning of section 44

[28] Section 44 provides:

> "(1) A preservation of property order may make provision as the High Court deems fit for—
>
> (a) reasonable living expenses of a person holding an interest in property subject to a preservation of property order and his or her family or household; and

---

> (a) before the period allowed for an application under section 54 or an appeal under section 55 has expired; or
>
> (b) before such an application or appeal has been disposed of."

[9] *Fraser* above n 6 at para 43. See also *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) and *Carmichele v Minister of Safety and Security and Others* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

> (b) reasonable legal expenses of such a person in connection with any proceeding instituted against him or her in terms of this Act or any other related criminal proceedings.
>
> (2) A High Court shall not make provision for any expenses under subsection (1) unless it is satisfied that—
>
> (a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and
>
> (b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

[29] The plain reading of the section shows that it does two things. First, it confers a discretion on the High Court to direct that funds for reasonable living and legal expenses be paid from the seized property. The discretion given by section 44(1) is an open one subject to the condition that the court deems the order for living and legal expenses to be necessary. The nature of this discretion is a matter to which I return below. But more importantly, subsection (1) also identifies the class of applicants eligible to request the order. It stipulates that the applicant must be a person "holding an interest in the property subject to a preservation order and his or her family or household". Significantly, the subsection does not say the applicant must be a person from whom the property in question was seized. The determinant qualification is the interest in the property concerned.

[30] The request for payment of legal expenses can be made only by the person with interest in the property subject to the preservation order. The legal expenses must relate

to proceedings instituted against the applicant in terms of POCA or "other related criminal proceedings."

[31] The second thing done by section 44 is that, having conferred an open discretion under subsection (1), subsection (2) noticeably narrows down the discretion to limited circumstances. It lays down as a minimum requirement proof of certain specified facts to justify the granting of the order. In terms of subsection (2) it must be proved to the satisfaction of the court that the applicant cannot meet the expenses out of his or her property which is not subject to the preservation order. The applicant must disclose interest in the property. A sworn statement setting out fully the assets and liabilities of the applicant must also be submitted to the court. A careful examination of subsection (2) reveals that the required proof relates to the inability to meet expenses from the applicant's property falling outside the preservation order. The other requirements are concerned with the nature of information which must be placed before the court during the enquiry. The purpose of the full list of assets and liabilities is readily apparent. It helps the court to determine the inability to pay.

[32] Although section 44(2)(b) does not expressly say that the interest to be disclosed must be in the property subject to a preservation order, counsel for the NDPP was correct when he submitted that the subsection requires the applicant to disclose interest in the preserved property. The purpose for this is to inform the court not only of the nature of

interest held so as to show that an applicant has legal standing but also that she or he is entitled to have expenses paid from the property in question.

Jurisdictional facts

[33] In this Court, counsel for the NDPP argued that section 44(2) lays down jurisdictional facts, the existence of which is necessary before a court may exercise the discretion conferred by section 44(1). He submitted that the following prerequisites must be established before the exercise of the power and the court must be satisfied that each exist:

(a) the fact that the applicant cannot meet the expenses out of property that is not subject to the preservation order;

(b) the applicant must make a full disclosure of interest in the property subject to the preservation order; and

(c) the applicant must submit a sworn and full statement of all his assets and liabilities.

[34] If this construction were to be assigned to section 44(2), it would mean that courts cannot authorise payment for relevant expenses if one of those facts is not established, regardless of the circumstances of a particular case. Although the text of the subsection is capable of the construction contended for by the NDPP, it is not the only meaning that may be given to it. Where a provision is capable of more than one meaning, preference

must be given to the construction that renders the statute constitutionally compliant.[10] If a provision is capable of two reasonable interpretations which do not render the statute inconsistent with the Constitution, preference must be given to the meaning that promotes the spirit, purport and objects of the Bill of Rights.[11]

[35] To construe section 44(2) in the manner contended for by the NDPP would undermine the very purpose served by section 44. Without it the relevant chapter of POCA would be unconstitutional. Dealing with a similar provision of POCA in *Fraser*, this Court said:

> "Without the recognition of the right to legal representation in section 26(6), the scheme of the restraint embodied in POCA might well have been unconstitutional."[12]

[36] The interpretation advanced by the NDPP will not only be inconsistent with the promotion of the right to legal representation and the purpose of section 44, it will also lead to absurd results. In a case like the present a court would be disempowered. It would be precluded from authorising payment of expenses if the applicant has failed to submit a list of assets, even if there are no assets to list. A court would be denied the power to intervene even where it is satisfied that an applicant has no property that is not

[10] *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-6.

[11] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

[12] *Fraser* above n 6 at para 68.

subject to the preservation order and from which legal expenses could be raised. The failure to establish one of the facts in question would have fatal consequences to applications of this nature.

[37] To avoid all of this, section 44(2) must be interpreted to mean that a court will authorise payment of expenses if satisfied that the applicant cannot meet these expenses from unpreserved property and she or he is entitled to receive payment of expenses from the property subject to the preservation order. This interpretation accords with the purpose of section 44 and advances the right to legal representation. It also allows the court to exercise its discretion properly. When exercising the discretion, the court is required to engage in a balancing exercise. It must weigh the applicant's interests, including the right to legal representation, against the objects of preserving the property subject to a preservation order and preventing the applicant from benefitting unduly from that property. *Fraser* lays down a similar approach. In that case this Court said:

> "The circumstances of each case have to be considered in order to reach a determination which is fair and just in view of the objects and wording of POCA, together with an accused person's constitutionally protected fair trial rights, existing rules and principles of the law of insolvency and other relevant areas of law. The High Court should seek as best as possible to ensure that a defendant neither benefits unduly from the terms of a restraint order, nor is prejudiced as far as reasonable legal and/or living expenses are concerned."[13]

[13] *Fraser* above n 6 at para 72.

[38] It is at the stage of balancing the competing interests that a court may take into account factors like whether the applicant has disclosed interests in the relevant property and, where it is necessary, a list of assets and liabilities has been submitted. It is the court hearing the application for expenses which is better placed to determine the impact of a failure to furnish information necessary to enable the court to exercise its discretion. But the threshold in every case will always be that the court is satisfied that the applicant has no property that is not subject to a preservation order and from which the requested expenses may be met. This is essential for the correct balance to be maintained.

Nature of the discretion

[39] Section 44 confers a discretion upon the High Court that granted the preservation order. It is that particular High Court alone which may exercise it and make an order authorising payment of expenses from the property subject to a preservation order. This manifestly illustrates that the discretion is a strict one. Indeed, in *Fraser* this Court said:

> "The discretion of a High Court hearing an application of a creditor to intervene in section 26(6) proceedings is one with which a Court of Appeal will only interfere in limited circumstances. . . . An appellate Court will not question whether the decision reached by the Court of first instance was the correct one."[14]

[14] *Fraser* above n 6 at para 71. Section 26(6) of POCA provides:

> "Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit—
>
> (a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
>
> (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,

[40] This is the right approach on appeal to the exercise of a strict discretion. Interference with that discretion is permissible only where the discretion is not exercised judicially. The examples of such instances are where:

(a) the exercise of the discretion has been influenced by wrong principles of law;

(b) the exercise of the discretion has been influenced by a misdirection or a wrong appreciation of the facts; and

(c) the court had reached a decision which could not reasonably have been made by a court properly applying its mind to all relevant facts and principles.[15]

[41] As observed in *Fraser*, the fact that the impugned decision appears to be wrong does not constitute justification for interfering with the exercise of this type of discretion on appeal. Reaffirming the principle in *Giddey NO v J C Barnard and Partners*,[16] this Court said:

---

if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."

[15] *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 110.

[16] [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC). See also *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

> "The ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense. The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the Court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law." (Footnotes omitted.)[17]

[42] The NDPP, however, approached the present case on the footing that it was the Full Court which exercised the discretion. The argument advanced was that this Court should not have been satisfied that the respondent is unable to meet legal expenses from property that was not subject to the preservation order. In support of this contention counsel submitted that the respondent "enjoyed what appears on his own evidence to be a high standard of living since 2006, and was litigating over this period without the benefit of any assistance of an order under sections 44". This indicates, it was submitted, that he has other resources available to him to meet his expenses. Reference was made to the fact that he said he depended on charity and loans from family and friends. The charity and loans, the submission continued, constitute income which is property envisaged in section 44(2)(a).

[43] I will deal with this argument as if it were directed at the Court of first instance. The flaw in the argument advanced by the NDPP lies in its foundation. First, it is based

[17] *Giddey NO* at para 19.

on assumptions which were clearly dispelled by the respondent's evidence. The assumption that the respondent has been able to afford a high standard of living has been squarely controverted by his evidence to the effect that he had been unable to pay for even basic services like water and electricity. Furthermore, the assumption that he has been able to litigate without the legal expenses he seeks is not justified. There is evidence on record showing that he was unable to pay legal fees to his previous attorneys and that that led to a termination of representation by them. The fact that there were legal practitioners who were willing to take up his cause without pre-payment of legal fees cannot be a basis for the inference that he has resources from which he can pay legal expenses.

[44] Second, I have considerable difficulty in appreciating how loans and charity can constitute property that is not subject to the preservation order and from which the Court of first instance had to be satisfied that the respondent is capable of meeting legal expenses. The evidence on record points in the opposite direction. It shows that the respondent is unable to meet most of the financial obligations he had at the time the preservation order was granted. He may have enjoyed a high standard of living before the granting of the order but after it was granted the evidence shows that he was struggling to meet his financial obligations.

[45] Counsel for the NDPP further submitted that the respondent had failed to make the disclosure contemplated in section 44(2)(b). He argued that this subsection implicitly

requires an applicant to submit a sworn statement of current assets and liabilities. The fact that the respondent relied on affidavits which were three years old, it was contended, meant that he did not comply with the prerequisite of disclosure. I have already found that the subsection does not lay down prerequisites.

[46] To illustrate this non-disclosure, counsel drew our attention to the allegations set out above in paragraph 10 and with reference to the respondent's reply set out above in paragraph 14, counsel contended that section 44(2)(b) was not complied with. Although the reply furnished by the respondent was unsatisfactory, I cannot uphold the contention advanced by the NDPP. The amounts of R5.4 million and R1.7 million were sufficiently explained. In respect of the latter amount, the respondent said he was a signatory on the account of SA Homestead because he was an employee of that entity and not that it was his own account. This appears elsewhere in the respondent's papers, as does the explanation relating to the R5.4 million which appears in his affidavit dated 15 June 2006.

[47] The part that is unsatisfactory in his reply relates to the transfer of $22 000 into foreign bank accounts, including that of Ben Hamo. The respondent failed to deal with the allegation except saying that he is not Hamo. In this regard the respondent was clearly not open and frank. But these transactions, which apparently were done before the granting of the preservation order, fall short of controverting the evidence which satisfied the Court of first instance on the respondent's inability to meet legal expenses.

More importantly, the unsatisfactory reply does not relate to a disclosure of interest in the preserved property. Therefore, it cannot be invoked in support of the assertion that there was non-disclosure.

[48] Moreover, in so far as the property covered by the preservation order is concerned, there was a disclosure of interest. As the respondent did not acquire assets from the date on which the preservation order was granted, he had nothing to list as an asset. With regard to liabilities, it cannot be disputed that the loans he received after the preservation order constituted liabilities. Therefore, he has failed to submit the list to the Court.

[49] The question that arises in this regard is whether in the light of this failure alone, the Court of first instance ought to have refused the relief it granted. Put differently, the question is whether that Court failed to exercise its discretion judicially in the manner described above. In my view, the failure to update the list of liabilities cannot support the finding that the discretion was not exercised judicially. I agree with counsel for the NDPP that the purpose for the list of assets and liabilities is to help the court to determine whether an applicant is possessed of property not subject to the preservation order and from which he is able to meet the relevant expenses. Where, as here, the court is so satisfied from other evidence, the need for the list falls away. Moreover, liabilities cannot be proof of an ability to meet expenses. Nor do they constitute property. On the contrary, if their list had been submitted, it would have reinforced the Court's finding that the respondent was not able to meet legal expenses.

[50] In these circumstances, I find that the NDPP has failed to establish a ground justifying interference with the exercise of a discretion by the Court of first instance. Accordingly, the Full Court was right in dismissing the appeal. It follows that in this Court too, the appeal must fail.

The other judgments

[51] I have read the judgments prepared by my colleagues Cameron J and Zondo J setting out their approach to the matter and the construction they accord to section 44. Before I give reasons why I do not agree with their interpretation, I must make the following observations and clarify some issues. First, it is asserted that Mr Elran, who is yet to be convicted, did not suffer unfairness flowing from a preservation order that prevented him from dealing with his entire estate.[18] This assertion is made notwithstanding the fact that the order was obtained in the absence of the party concerned (*ex parte*). Two reasons are offered in its support. The one reason is that the order would lapse upon the expiry of 90 days if no forfeiture application is made. However, the record shows that the expiry of the order was prevented by the NDPP instituting forfeiture proceedings within 90 days.

[52] The other reason is that Mr Elran was free to apply for rescission of the preservation order if it caused him hardship. But for him to do so, he required legal

[18] Cameron J's judgment at [72] below.

representation which on the facts on record he could not afford because his whole estate was under a preservation order. Proceedings involving POCA are complex because the Act is complex and difficult to interpret.[19] To have legal representation is therefore necessary. The record does not show that Mr Elran was aware that he could seek rescission. Even if he was, the likelihood is that he would have battled to understand POCA which is difficult to interpret, even to Judges. The importance of legal representation in complex court proceedings in a country like ours cannot be overemphasised. The disparities in our society where the levels of poverty and illiteracy are high have been noted by this Court in a number of decisions.[20]

[53] The interpretation preferred in my Colleagues' judgments is that section 44(2) sets preconditions for the exercise of the discretion conferred by section 44(1). Absent these preconditions, the power to authorise payment of legal expenses does not exist.[21] Bearing in mind that here we are concerned with the exercise of a narrow discretion, interference will be justified only if one of the recognised grounds exist. The relevant one here would be that the High Court did not have the power to authorise payment of legal fees from the preserved property. I accept that if section 44(2) creates preconditions which must all be in existence before a court may exercise the discretion, then the High

[19] *National Director of Public Prosecutions and Another v Mohamed and Others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) (*Mohamed I*).

[20] *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) and .*Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

[21] See Cameron J's judgment at [80] below.

Court ought not to have granted the order because the respondent had not submitted a list of liabilities pertaining to loans he received from friends and family for his living expenses.

[54] The question whether section 44(2) lays down preconditions or jurisdictional facts lies at the heart of our disagreement. For his interpretation Cameron J relies heavily on *Naidoo*.[22] But *Naidoo* dealt with a different issue. The question there was whether a court can order payment of legal expenses from assets held by a third party and against whom there was a restraining order in place.[23] Moreover, in *Naidoo* this Court was concerned with the interpretation of section 26 of POCA.[24] However, my Colleague holds that sections 26 and 44 are similar. I am unable to agree. To start with, the structures of the relevant parts (sections 26(6) and 44(2)) are different. I will deal with this in detail when I consider the text of section 44(2) relied on by my Colleague.

[55] Furthermore, the requirements set out in these sections are in material respects different. Section 26(6) contains two requirements only and provides that the High Court may order provision of legal expenses—

[22] *Naidoo and Others v National Director of Public Prosecutions and Another* [2011] ZACC 24; 2012 (1) SACR 358 (CC); 2011 (12) BCLR 1239 (CC) (*Naidoo*).

[23] Id at para 1.

[24] Id at para 5.

> "if the court is satisfied that the person whose expenses must be provided for has disclosed under oath *all his or her interests in property subject to a restraint order* and that the person cannot meet the expenses concerned out of his or her unrestrained property." (Emphasis added.)

[56] The section stipulates these requirements: the inability to meet expenses out of unrestrained property and a full disclosure of interest in the restrained property. The nature of the disclosure is specific. It is a disclosure of interest and not of property. The reason for this requirement is that the court must be informed of the nature of the applicant's entitlement to payment of expenses from the restrained property. Significantly, apart from the inability to meet expenses, the reach of section 26 does not extend beyond property subject to a restraint order. Whereas section 44(2) requires a full list of assets and liabilities. In so far as assets are concerned, this requirement is directed at unpreserved property. Section 26(6) does not require such a list.

[57] Therefore, the similarities between the two sections are limited to the disclosure of interests and the inability to meet expenses. But as I will demonstrate below, while section 26(6) requires that both conditions be met before the order could be made, section 44(2) does not require that all the conditions be satisfied. However, it is important to point out at this stage that the complaint of non-disclosure raised in this case relates to the respondent's living expenses after the granting of the preservation order. In the light of the above analysis, the complaint is misconceived. The disclosure Mr Elran was required to make is a disclosure of interest in the preserved property.

[58] In further support of his interpretation, Cameron J invokes the text of section 44(2). Relying on the use of the words "shall not" he holds that the section creates "threshold preconditions without the fulfilment of which the court cannot exercise the section 44(1) power."[25] I accept that the use of the words "shall not" indicates peremptoriness. But I read section 44(2) as limiting the peremptory condition to the inability to meet expenses. My Colleague relies on the use of the word "and" between subsections (2)(a) and (2)(b) for the conclusion that all conditions are "cumulative . . . and interlinked".[26]

[59] While I accept that the use of the word "and" may be read as my Colleague does, I think that in the present context it should not be so read. I say this for two reasons. The first is textual and contextual. The context is provided by section 44(1) which confers the discretion. Like section 44(2), section 44(1) has two subsections. And like section 44(2), it employs the word "and" between the two subsections. Subsection (1)(a) deals with living expenses and subsection (1)(b) is concerned with legal expenses. Yet it can hardly be argued that the Court must order provision of both living and legal expenses in every case where such an order is made. In the text nothing indicates that the word "and" which occupies the same position in both sections carries different meanings. Therefore,

[25] See Cameron J's judgment at [82] below.

[26] Id.

the use of "and" in section 44(2) is not different from its use in section 44(1). It has no cumulative effect.

[60] The second reason is that on the interpretation favoured by both my Colleagues, the failure to submit a list of liabilities alone will mean that the discretion cannot be exercised, irrespective of how much of an injustice the consequences may be. In a case where, as is the position here, the whole estate of the applicant is placed under preservation and the applicant places on record uncontroverted evidence that he or she has acquired no assets since the granting of a preservation order, on my Colleagues' interpretation, the Court would equally have no power to exercise. In my view this construction does not promote the spirit, purport and the objects of the Bill of Rights, an obligation which is imposed on every court when interpreting legislation.

[61] In his judgment, Zondo J holds that section 44 confers power and that the discretionary part of that power is restricted to determining whether the amount of expenses claimed is reasonable or not.[27] I do not agree. In similar circumstances this Court in *Fraser* held that section 26(6) of POCA gives the High Court a discretion to authorise payment of legal expenses. The Court stated:

[27] See Zondo J's judgment [103] below.

> "Section 26(6) gives a discretion to the High Court which issues a restraint order to make provision for the reasonable living and legal expenses of the defendant, who (as stated earlier) is also an accused. This case is concerned with that discretion. The Court must be satisfied that the defendant has disclosed all of his or her interests in property subject to the restraint order and that he or she cannot meet the expenses out of property which has not been restrained."[28]

[62] The reading of the judgment in *Fraser* reveals that the case was not solely about the intervention of a creditor. Mr Fraser had applied for payment of legal expenses from the restrained property. The creditor sought to intervene in that application so that it could oppose payment of legal expenses. Therefore, the interpretation of section 26(6) and the nature of the power it confers were some of the issues to be determined. Accordingly, that interpretation must be followed when the section is dealt with unless it is shown to be wrong. Section 44(1) confers a similar discretion.

[63] The approach adopted by Zondo J to the assessment of evidence and the conclusion he reaches was influenced by the premise from which he departs. I agree that an application to strike out alluded to by the Full Court would have failed. The allegation that Mr Elran survived on loans and gifts was a reply to what was raised in the NDPP's answering affidavit. A party is entitled to reply to allegations in answering affidavits. However, I do not agree that in setting out the reply, the replying affidavit breached the rule that requires a party to stand or fall by what appears in the founding affidavit. That

[28] *Fraser* above n 6 at para 13.

rule prohibits parties from raising new causes of action in reply. That is not the position here. Nor does section 44 require that all relevant facts be contained in the founding affidavit. The real question is whether on the totality of evidence placed before the Court of first instance, it should have been satisfied that Mr Elran had no unpreserved property from which he could meet legal expenses. The record shows that on the evidence as a whole the finding that he did not have such property was not improper.

[64] I would have granted leave to appeal and then ordered that the appeal be dismissed with costs.

CAMERON J (Mogoeng CJ, Froneman J, Van der Westhuizen J (except for [90]) and Zondo J concurring):

[65] I am grateful to my colleague Jafta J for setting out the facts and issues so lucidly in his judgment (main judgment), but I differ from his reasoning and conclusion. My differences go to the main judgment's overall approach to the legislation, its interpretation of the specific provisions at issue, as well as its inferences from the facts. In my view, the appeal by the National Director of Public Prosecutions (NDPP) should succeed.

[66] To start with approach. The Prevention of Organised Crime Act[29] (POCA) has been described as draconian.[30] It is necessarily and rightly far-reaching and robust. Two principal reasons have impelled modern democratic states to enact asset forfeiture legislation like POCA. The first is that, given the fantastically rich spoils the international economy offers, the deterrent effects of even long prison sentences fade. Hence the need for civil recovery mechanisms under which the state can seize property obtained through unlawful activities without having to secure a conviction in a criminal court.[31] Crime must be tackled independently of the criminal justice system, and at source – by inhibiting its rewards.

[67] The second reason POCA-like legislation is indispensable is the intricacy and complexity of modern law-breaking. No longer is economic crime committed only through romantically imaginable methods like piracy, highway robbery and smuggled contraband. All that, if not past, is now of comparatively lesser importance. Most modern crime is committed through infinitely more sophisticated means – indirect and electronic. More importantly even, it is then concealed through those same means. The internet, electronic communication and the arcane recesses of the international banking system have enabled criminals to outsmart even the smartest of law enforcement systems.

[29] 121 of 1998.

[30] See [23] above.

[31] See Leong *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Ashgate Publishing Limited, Hampshire 2007).

[68] Hence, here and elsewhere, the indispensable response has been asset forfeiture legislation. Follow the money. Seize the profits. Target the spoils of criminality. This is what POCA does. As in other democracies,[32] it creates broad, new categories of offences. These include offences relating to racketeering activity,[33] dealing in the proceeds of unlawful activities[34] (money laundering,[35] assisting another to benefit from the proceeds of unlawful activities[36] and acquisition, possession or use of proceeds of unlawful activities[37]) and criminal gang-related activities.[38] It targets the proceeds of unlawful activities[39] by enabling confiscation of their proceeds upon a criminal conviction, as well as restraint orders[40] and realisation of property after a confiscation

[32] Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing Limited, Cheltenham 2009).

[33] Chapter 2, sections 2 and 3 of POCA create offences and penalties relating to a "pattern of racketeering activity". This is defined in section 1 as:

> "the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1".

Schedule 1 includes, amongst others: most serious common law crimes (murder, rape, kidnapping, arson, public violence, robbery, assault with intent to commit grievous bodily harm); statutory sexual offences; "any offence under any legislation dealing with gambling, gaming or lotteries"; extortion; child-stealing; theft; fraud; forgery; "offences relating to the coinage"; drugs offences; arms offences; liquor offences; exchange-control offences; precious metals and precious stones offences; and perjury.

[34] Chapter 3, sections 4-8 of POCA.

[35] Id section 4.

[36] Id section 5.

[37] Id section 6.

[38] Id chapter 4, sections 9-11.

[39] Id chapter 5, sections 12-36.

[40] Id sections 24A-29A.

order has been made.[41] In addition, civil recovery of property is made possible through preservation and forfeiture orders.[42]

[69] This Court has repeatedly affirmed the constitutionality of this statutory scheme.[43] In *Mohamed 1*,[44] it did so observing that "conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice."[45] And it noted that the problems POCA targets "make a severe impact on the young South African democracy".[46]

[70] There is no constitutional challenge to these provisions. We therefore have no reason to approach the powers POCA confers on courts with reserve. We should embrace POCA as a friend to democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them.

---

[41] Id sections 30-6.

[42] Id chapter 6, sections 37-62.

[43] *Naidoo v National Director of Public Prosecutions* [2011] ZACC 24; 2012 (1) SACR 358 (CC); 2011 (12) BCLR 1239 (CC) (*Naidoo*); *Falk v National Director of Public Prosecutions* [2011] ZACC 26; 2012 (1) SACR 265 (CC); 2011 (11) BCLR 1134 (CC); *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (*Fraser*); *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) (*Mohamed 2*); and *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) (*Mohamed 1*).

[44] *Mohamed 1* above n 43.

[45] Id at para 15.

[46] Id.

[71] The NDPP obtained a preservation order against Mr Elran in March 2006 because reasonable grounds existed for believing that the property the order covered constituted the proceeds of his drug-dealing activities and associated money laundering. It is correct that a preservation order under POCA may be obtained without notice to a respondent (ex parte),[47] but there are sound grounds for sanctioning this procedure in cases where those targeted, if given notice, may thwart the object by dissipating the very assets sought to be preserved.

[72] In this specific case, even though Mr Elran has not yet been convicted, there was no unfairness. On the contrary: the order would, in the absence of a forfeiture application, expire 90 days after notice of it was published.[48] Meanwhile, Mr Elran, as

---

[47] Section 38 provides:

> "**38. Preservation of property orders**
>
> (1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
>
> (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned—
>
> (a) is an instrumentality of an offence referred to in Schedule 1;
>
> (b) is the proceeds of unlawful activities; or
>
> (c) is property associated with terrorist and related activities.
>
> (3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.
>
> (4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order."

[48] Section 40 of POCA provides:

the person most affected by the order, was free to apply for its rescission if it caused him undue hardship, and the hardship outweighed the risk that the property the order covered might be destroyed, lost, damaged, concealed or transferred.[49]

[73] The NDPP in fact instituted forfeiture proceedings promptly, in July 2006. It is those proceedings that became mired in delays, partly because Mr Elran never filed an affidavit in answer to them. He claims that this is because he is out of funds. Meanwhile, he says he is living on gifts and loans, none of the details of which he discloses. To his current application for payment of legal expenses out of the preserved property, filed in June 2009, he attached affidavits nearly three years old.

"**40. Duration of preservation of property orders**

A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the *Gazette* unless—

(a) there is an application for a forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order;

(b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or

(c) the order is rescinded before the expiry of that period."

[49] Section 47(1) of POCA provides:

"A High Court which made a preservation of property order—

(a) may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded."

[74] The main judgment notes that Mr Elran's reply to the NDPP's challenge was "unsatisfactory",[50] and that he made no disclosure at all of his liabilities, despite the statute's requirement that he should. The main judgment concludes that, despite these shortcomings, the grant to Mr Elran of the relief he sought was impeccable because the disclosure requirement the statute specifies before an expenses order can be granted is not a precondition, but merely a consideration to be 'balanced' in exercising the statutory discretion to make the order sought.[51]

[75] I disagree. Section 44(1) empowers ("may") a court to make provision for living and legal expenses, but section 44(2) says that a court "shall not" afford living and legal expenses "unless it is satisfied" that—

> "(a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and
>
> (b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

[76] In *Mohamed 1*,[52] this Court noted that provision for expenses "will not be made unless the High Court is satisfied that the relevant person cannot meet the living or legal expenses out of his or her property not subject to a preservation order and that the person

[50] See [46] above.

[51] See [37]-[38]; [45]; and [49] above.

[52] *Mohamed 1* above n 43.

has disclosed on oath all her property."[53] This Court appears to have regarded the requirements of sub-paragraphs (a) and (b) of section 44(2) as preconditions to the exercise of the power in section 44(1). And quite rightly so. Why else would the legislation say that a court "shall not" make provision for expenses unless it is satisfied that the specifications set out in 44(2)(a) and (b) have been met?

[77] In *Fraser*[54] and *Naidoo*,[55] building on *Mohamed 1*,[56] this Court embraced this very approach to the interpretation of section 26 of POCA. Section 26 relates to restraint orders[57] and its provisions are similar to those of section 44. In *Fraser*,[58] this Court

---

[53] Id at para 21.

[54] *Fraser* above n 43.

[55] *Naidoo* above n 43.

[56] *Mohamed 1* above n 43.

[57] Section 26 of POCA provides in relevant part as follows:

> "**26. Restraint orders**
>
> (1) The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.
>
> . . .
>
> (6) Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit—
>
> (a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
>
> (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,
>
> if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."

[58] *Fraser* above n 43.

pointed out that a defendant who applies for living or legal expenses "must satisfy"[59] the court in relation to the preconditions. As was explained in *Naidoo*:[60]

> "To interpret the wide discretion conferred by section 26(1) as permitting an override of the preconditions expressly set in section 26(6) would run counter to the scheme of the provisions as a whole. The provision for reasonable legal and living expenses in section 26(6) is narrowly and finely crafted. Its careful mechanism should not readily be overridden. And its overall legislative purpose must be borne in mind. It is to discourage defendants who face criminal prosecution from hiding their assets. If a defendant retains the alleged proceeds of crime, they remain available for living and legal expenses. But if these assets are donated away, they become unavailable for this purpose.
>
> This is a legitimate statutory objective. And our construction of the provisions should recognise it."[61]

[78] The two sections of POCA at issue in *Naidoo*[62] and before us here are similar. The only significant difference is that section 44(2), at issue here, makes unequivocal the constraint this Court in *Fraser*[63] and *Naidoo*[64] recognised as embedded in section 26(6). Section 44(2) expressly stipulates that a court "shall not make" provision for legal or living expenses "unless" the person whose assets are restrained or preserved satisfies it in the respects required.

---

[59] Id at para 55.

[60] *Naidoo* above n 43.

[61] Id at paras 30-1.

[62] *Naidoo* above n 43.

[63] *Fraser* above n 43.

[64] *Naidoo* above n 43.

[79] This Court made three findings about the relevant provisions in *Naidoo*.[65] The first is that the requirements spelled out create "preconditions" to the wide power to allow living or legal expenses.[66] The second is that to interpret the wide power as permitting an override of the preconditions "would run counter to the scheme of the provisions as a whole".[67] The third is that the provision for reasonable legal and living expenses is "narrowly and finely crafted", and its careful mechanism "should not readily be overridden".[68] This is because the legislative purpose is to discourage defendants who face criminal prosecution from hiding their assets.[69]

[80] Section 44(2) thus creates two preconditions for the exercise of the power conferred in section 44(1). The first is need. The second is disclosure. Without their existence, to the court's satisfaction, the power does not exist. The words "shall not" do not leave enough wiggle space for interpreting the provision to mean that the conditions thereafter specified are merely factors to be taken into consideration in exercising a discretion that can be exercised regardless of their existence.[70]

---

[65] Id.

[66] Apart from the passage quoted in the main body of this judgment at [77] above, *Naidoo* above n 43 at para 20 also explains that section 26(6) makes allowance for expenses "only on limited terms", including the condition of full disclosure.

[67] *Naidoo* above n 43 at para 30.

[68] Id. See too *Naidoo* above n 43 at para 19, where the Court noted that POCA's objective is attained "through complex machinery, whose operation and effect must be carefully calibrated."

[69] Id.

[70] See Bishop and Brickhill "'In the beginning was the word': The role of text in the interpretation of statutes" (2012) 129 *SALJ* 681 where the authors argue that an unrestrained interpretive method that wilfully ignores legislative text threatens the rule of law and the separation of powers.

[81] No injustice or absurdity flows from this statutory scheme. The property is preserved only because there are reasonable grounds for believing that it constitutes the proceeds of criminal activities.[71] The very point of requiring disclosure is to make sure that the applicant cannot meet the expenses out of property not subject to the preservation order. In addition, it seems clear that the disclosure requirement is broad ("all"; "interests in the property"; "full"). Disclosure therefore ought to be precisely tailored to the statute's requirements. In its absence, the court cannot make an order.

[82] So, in my view, "shall not" means what it clearly says. The provision creates threshold preconditions without the fulfilment of which the court cannot exercise the section 44(1) power. The threshold preconditions of need and disclosure are both cumulative ("and") and interlinked, since a court cannot determine need ("cannot meet") without the information required to be disclosed. The main judgment appears to accept that the requirement of need in section 44(2)(a) is a minimum threshold.[72] Yet the clear

[71] Section 38(2) of POCA provides that a High Court shall make a preservation of property order if there are "reasonable grounds to believe that the property concerned—

(a) is an instrumentality of an offence referred to in Schedule 1;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities."

Section 1 of POCA defines "unlawful activity" as "conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere."

The scope of criminal activities contemplated by section 38(2) of POCA is thus wide and not limited to the prescribed list of crimes in Schedule 1 of POCA.

[72] See [38] above ("the threshold in every case will always be that the court is satisfied that the applicant has no property that is not subject to a preservation order and from which the requested expenses may be met.")

wording of the provision, and the interlinking of the two requirements, shows that both constitute preconditions.

[83] Here, those preconditions were not met. The main judgment finds that the precondition in section 44(2)(a) is met even though it accepts that Mr Elran did not comply with section 44(2)(b). In June 2009, Mr Elran launched the present expenses application, solely for legal expenses. In his founding affidavit he denied having any funds or property not subject to the preservation order. He therefore attached his two previous affidavits from May and June 2006. He provided no update.

[84] In answer, the NDPP assailed the extent of Mr Elran's disclosure. In particular, the NDPP pointed out that he had been able to meet his living and legal expenses over a period of three years. The NDPP further pointed out that Mr Elran had failed to lodge a sworn and full statement of assets and liabilities. Nor had he disclosed his current income.

[85] In reply, Mr Elran said that he was not in a position to pay his legal and living expenses and that he had "been forced to live on loans and charity from friends and family."

[86] The NDPP's main argument was this. Mr Elran had lived for three years since his last affidavits. He did not disclose how he lived, or from where his means had come. All

he said was that he relied on charity and loans. Given that he carried the burden of establishing his entitlement to an expenses order, specifically by proving full disclosure, his mere say-so that he had no assets and that he was receiving gifts and loans was not enough. His averments created a considerable suspicion that he had other means that he had not disclosed. Therefore, neither of the statutory preconditions required for the court to exercise its power in favour of granting him legal expenses was fulfilled.

[87] This is by no means unpersuasive. Indeed, simple logic indicates that gifts would become assets unless consumed totally at the time when Mr Elran should have made disclosure; that loans were liabilities unless paid back at the same date of disclosure; and that if Mr Elran is to be believed the miraculous effect would be that the gifts he received were exactly enough to pay back all his loans as at the date when he had to make disclosure.

[88] However, while Mr Elran's propagation of his lifestyle in the absence of any visible means of support certainly arouses considerable suspicion, the clearest basis for finding that the High Court had no power to make an expenses order in his favour lies on narrower grounds. It is this. Mr Elran claims to be living off loans. Section 44(2)(b) required that he submit "a sworn and full statement of all his or her assets and liabilities." As his counsel conceded, and the main judgment finds,[73] the loans must be liabilities. They must have arisen since May and June 2006. Therefore, Mr Elran had to disclose

[73] See [48] above.

them. He has not done so. The point of requiring disclosure of liabilities like loans is to enable a court properly to assess whether an applicant has adequately disclosed his property not subject to the preservation order. Mr Elran did not do so. The High Court therefore had no discretion to make an order in his favour.

[89] The scheme is clearly constitutional. Its words should be taken to mean what they say.

[90] I have had the benefit of reading the judgment by my colleague Zondo J, in which he considers the nature of the power section 44(1) confers on a court, the differences between section 26 and section 44 and the application of the relevant provisions of POCA to the facts of the case. I agree with his exposition, and concur in his judgment.

Order

[91] The following order is made:

1. Leave to appeal is granted.
2. The appeal is allowed.
3. The orders of the Full Court and the High Court are set aside.
4. In their place, there is substituted the following order –

   The application is dismissed.
5. There is no order as to costs.

ZONDO J (Mogoeng CJ, Cameron J and Froneman J concurring):

Introduction

[92] I have had the opportunity of reading the judgments prepared by my Colleagues, Jafta J and Cameron J. Jafta J finds that there is a constitutional issue in this matter and that leave to appeal should be granted but concludes that the appeal should be dismissed. I agree with him on the first two issues. However, on the third issue I take a different view. In my view the appeal should be upheld. I concur in Cameron J's judgment. However, in the light of the importance of the matter and the fact that there are other important aspects of the case which are not covered in Cameron J's judgment which I think should be dealt with, I consider it important to set out my views in a separate judgment.

The law

[92] In their respective judgments both Jafta J and Cameron J have said enough about the reason for and the objectives of the Prevention of Organised Crime Act[74] (POCA).[75] Accordingly, I do not propose to deal with those matters in this judgment. Section 38(1) of POCA[76] confers upon the National Director of Public Prosecutions (NDPP) the right to

[74] 121 of 1998.

[75] See Jafta J's judgment at [22] and Cameron J's judgment at [66]-[68] above.

[76] Section 38(1) reads as follows: "The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property."

apply to the High Court on an ex parte basis for an order prohibiting any person from dealing in any manner with any property that is the subject of the order (referred to in this judgment as a preservation order). If the High Court makes a preservation order, it may make it subject to such conditions and exceptions as it may specify. The High Court can only grant a preservation order if there are reasonable grounds to believe that the property is an instrumentality of an offence or proceeds of unlawful activities or associated with terrorist and related activities.[77]

[93] I draw attention to the definition of "property" which is "money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof".[78] The term "instrumentality of an offence" is defined as "any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere".[79]

[94] Section 38 does not require that, before the court may make a preservation order, it should have reasonable grounds *to suspect* that the property is an instrumentality of an

[77] Section 38(2) reads as follows:

> "The High Court shall make an order referred to in subsection (1) if there are *reasonable grounds to believe* that the property concerned—
>
> (a) is an instrumentality of an offence referred to in Schedule 1;
>
> (b) is the proceeds of unlawful activities; or
>
> (c) is property associated with terrorist and related activities." (My emphasis.)

[78] Section 1 of POCA.

[79] Id.

offence or is proceeds of unlawful activities. It requires that the court *be satisfied* that there are reasonable *grounds to believe* that it is so. This choice of words is not without significance. The requirement of reasonable grounds to suspect is a lower threshold than the requirement of being satisfied that there are reasonable grounds to believe that the property is an instrumentality of an offence or is proceeds of unlawful activities. There is a difference between saying: "I suspect that" and saying: "I believe that".

[95] Part of the effect of the above is that this matter must be approached on the acceptance that the court which made the preservation order based its order on a belief on reasonable grounds that the property under the preservation order was an instrumentality of an offence or the proceeds of unlawful activities. Until that order is set aside, we must take it that the court made it in accordance with the requirements of the statute. I say this despite the fact that a preservation order is granted on the strength of one side of the story without the respondent's version. Once a High Court has made a preservation order, any person is prohibited from dealing in any manner with the preserved property except in accordance with the order or directions of that court.[80] I now turn to consider section 44 of POCA.[81]

Section 44

[96] Section 44(1) reads as follows:

[80] I shall, for convenience, refer to such property as the "preserved property" and to property that is not subject to a preservation order as "unpreserved property" where the distinction is important.

[81] Any reference to section 44 in this judgment is a reference to section 44 of POCA.

"A preservation of property order may make provision as the High Court deems fit for—

(a) reasonable living expenses of a person holding an interest in property subject to a preservation of property order and his or her family or household; and

(b) reasonable legal expenses of such a person in connection with any proceeding instituted against him or her in terms of this Act or any other related criminal proceedings."

POCA goes on to provide as follows in section 44(2)(a) and (b):

"A High Court shall not make provision for any expenses under subsection (1) unless it is satisfied that—

(a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and

(b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

[97] Section 44(1) serves the purpose of conferring power on the High Court which made the preservation order to provide for the living and legal expenses of a person holding an interest in the preserved property. Section 44(2) precludes the High Court from making provision for any living or legal expenses in favour of the person contemplated in section 44(1) unless two conditions are met. The conditions are that the court must be satisfied that:

"(a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and

(b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

That the High Court is precluded from providing for such expenses when it is not satisfied as to the two conditions prescribed in section 44(2)(a) and (b) is based on the phrase in section 44(2): "A High Court shall not make provision for any expenses under subsection (1) *unless it is satisfied that* . . .".

[98] The effect of section 44(2) is that, when the High Court considers an application by a person holding an interest in preserved property for it to provide for his or her expenses contemplated in section 44(1), it must inquire into two matters. The one is whether or not the person concerned "cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order". If it concludes that the person can meet the expenses from his or her property that is not subject to the preservation order, that is the end of the inquiry and the court must dismiss the application. In such a case that person will have failed to meet the condition prescribed in section 44(2)(a). In this regard it needs to be pointed out that the mere fact that the person has unpreserved property does not on its own mean that the condition in section 44(2)(a) is not met. The court must first inquire into whether, having regard to all the relevant factors, it can be said that that unpreserved property is sufficient to enable the person to meet the expenses in question out of it. The relevant factors will include that person's other commitments. This means that it is possible to have a case where such

person can meet, for example, his or her living or legal expenses partly from his or her unpreserved property and partly from his or her preserved property.

[99] If the court concludes that the person concerned cannot meet the expenses in issue from his or her unpreserved property, the court must proceed to inquire into the second condition. That is whether or not the person concerned has "disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities" as required by section 44(2)(b).

[100] If the court is also satisfied that the person has disclosed under oath all his or her interests in the property and has submitted to that court "a sworn and full statement of all his or her assets and liabilities", the court has no discretion but must make provision for the expenses requested. It cannot find that the person cannot meet expenses from unpreserved property and that he or she has disclosed under oath all his or her interests in the property and has submitted to it a sworn and full statement of all assets and liabilities and yet not order a provision of expenses. In other words section 44(2) means that if the High Court is satisfied that—

(a) the person cannot meet the expenses concerned out of his or her unpreserved property; and

(b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities,

it must make provision for any expenses contemplated in subsection (1). This construction of section 44(2) is justified by the language employed in the provision. Accordingly, if the court is satisfied as to the two conditions in section 44(2)(a) and (b), it has no discretion but to authorise the payment of the expenses.

[101] If the High Court is not satisfied as to the two conditions, it also has no discretion but must dismiss the application. It cannot say: I am satisfied that the applicant can meet living or legal expenses from the unpreserved property and that he or she has withheld information about the extent of interests in the property and has not submitted a statement of all assets and liabilities but I will, in any event, grant legal expenses from the preserved property. Accordingly, it seems to me that, despite the use of the word "may" in section 44(1), the High Court actually has no discretion to provide or not to provide for the expenses contemplated in section 44(1) once it has completed its inquiry into whether the person applying for the provision of such expenses meets the conditions prescribed in section 44(2). If the two conditions have been met, the court must make an order providing for the expenses in question. If any one of the two conditions has not been met, the court is precluded from making provision for expenses.

[102] The way that the provisions of section 44(1) and (2) are formulated has strong similarities to the way the provisions of section 34(5) and (6) of the Restitution of Land Rights Act[82] (RLRA) are formulated. Section 34(5) and (6) reads as follows:

> "(5) After hearing an application contemplated in subsection (1), the Court may—
>
> (a) dismiss the application;
>
> (b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant;
>
> (c) make any other order it deems fit.
>
> (6) The Court shall not make an order in terms of subsection 5(b) unless it is satisfied that—
>
> (a) it is in the public interest that the rights in question should not be restored to any claimant; and
>
> (b) the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection 5(b) before the final determination of any claim."

[103] In *Minister of Defence and Another v Khosis Community at Lohatla and Others*[83] the Land Claims Court held that the use of the word "may" in section 34(5) of the RLRA gave the court a discretion to dismiss an application brought under section 34 even if the jurisdictional requirements of section 34(6) had been met. In *Khosis Community, Lohatla, and Others v Minister of Defence and Others*[84] (*Khosis*) the Supreme Court of

[82] 22 of 1994.

[83] [2002] ZALCC 39, available at http://www.saflii.org/za/cases/ZALCC/ 2002/39.pdf, accessed on 11 February 2013.

[84] 2004 (5) SA 494 (SCA).

Appeal, on appeal, rejected the Land Claims Court's construction of section 34(5) read with (6). The Supreme Court of Appeal said:

> "I do not agree that there is such an overriding discretion. Apart from the fact that it would not make sense to provide for such a discretion in the light of the stringent threshold requirements, the word 'may' in this context does not indicate the presence of any discretion. It simply defines the possible orders, depending on the court's findings. In other words, it performs a purely predicative function."[85] (Footnote omitted.)

I think that the use of the word "may" in section 44(1), when read in context, may well be linked to "reasonable living expenses" in para (a) and to "reasonable legal expenses" in para (b). If it relates to a discretion, it would have to be the discretion relating to the determination of what are reasonable living expenses and what are reasonable legal expenses and not to a discretion whether to grant or not to grant such expenses when the condition prescribed in section 44(2)(a) and (b) have been met or have not been met, as the case may be.

[104] In *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as* Amicus Curiae*)*[86] this Court had to consider whether or not a creditor may join proceedings under section 26(6) of POCA when a "defendant" applies to the High Court for an order providing for reasonable legal expenses out of property that is subject to a restraint order. The High Court had held that a creditor had no standing (*locus standi*) to be joined in the

[85] Id at para 7.

[86] [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

proceedings. On appeal the Supreme Court of Appeal held that the High Court had a discretion to join such a creditor in such proceedings.

[105] The question before the Court in *Fraser* was whether under section 26(6) of POCA[87] the High Court has a discretion to allow a creditor of a "defendant" to intervene in section 26(6) proceedings, and, if so, the nature and extent of the discretion to grant an order authorising living or legal expenses. Section 26(1) reads as follows:

> "The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates."

[106] Section 26(6) reads as follows:

> "Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit—
>
> (a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
>
> (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,
>
> if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."

[87] Any reference to section 26 in this judgment is a reference to section 26 of POCA.

[107] In *Fraser* this Court made statements to the effect that section 26(6) conferred upon the High Court a discretion to make provision for living or legal expenses. However, in reading those statements one must bear in mind that the real question before this Court in that matter was not whether section 26(6) conferred a discretion on the High Court to make an order providing for living or legal expenses. That question was considered within the context of this Court seeking to answer the real question before it. Van der Westhuizen J formulated the real question before this Court in that case as follows: "The question central to this application is whether a creditor of a defendant may join proceedings when the defendant applies to a court to provide in a restraint order for reasonable legal expenses connected to his criminal trial."[88] This Court's decision on that central question was that the High Court had a discretion to allow a creditor to intervene in section 26(6) proceedings.

Similarities and differences between sections 26(6) and 44(1) and (2)

[108] The terms of section 26(6)(a) and (b) are, to some extent, similar, though not identical, to the terms of section 44(1)(a) and (b) and section 44(2)(a) and (b). In section 26(6) it is, amongst others, provided that, without derogating from the generality of the powers conferred by section 26(6), "a restraint order *may* make such provision as the High Court *may think* fit" (my emphasis). Section 44(1) makes no reference to a derogation from the generality of any powers but does provide that "a preservation of

[88] *Fraser* above n 86 at para 2.

property order may make provision as the High Court *deems fit* for . . .” (my emphasis). What comes after “may think fit . . .” in section 26(6) is:

> “(a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
>
> (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate;
>
> if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.”

What comes after “deems fit for” in section 44(1) are paras (a) and (b) which are not, for purposes of the present matter, materially different from paras (a) and (b) of section 26(6) if one excludes that part of section 26(6)(b) that comes after the word “relate”.

[109] The last part of section 26(6) that starts with the words, “if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order” has some similarities with section 44(2) but is formulated differently. As already stated, section 44(2)(a) and (b) reads:

> “A High Court shall not make provision for any expenses under subsection (1) unless it is satisfied that—
>
> (a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and

> (b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

[110] The last part of section 26(6) is to the effect that, if the High Court is satisfied as to the matters provided for therein, a restraint order may make such provision as the High Court may think fit for the reasonable living expenses or legal expenses in section 26(6)(a) and (b). However, section 44(2) is rather different but very clear. It contains an injunction that the High Court "shall not make provision for any expenses under subsection (1) unless it is satisfied" as to the conditions stipulated in paras (a) and (b) of section 44(2). Section 26(6) has no similar injunction. I am inclined to think that this injunction constitutes a material difference between the provisions of section 26(6)(a) and (b) and those of section 44(1)(a) and (b) and (2)(a) and (b). Since this Court was not dealing with section 44(1) and (2) in *Fraser*, care must be taken in applying to section 44(1) and (2) certain statements made in *Fraser* in considering section 26(6) and other provisions of POCA. In particular I do not think that the statements in *Fraser* to the effect that section 26(6) gives the High Court a discretion can necessarily be said to apply in section 44(1) and (2).

[111] What is the relevance of the requirement in section 44(2)(b) that the person applying for an order providing for expenses from the preserved property must disclose "under oath all his or her interests in the property" and that he or she must submit "to that Court a sworn and full statement of all his or her assets and liabilities"? The reason for

requiring the person to disclose all his or her interests in the preserved property is obvious. The court needs to know whether his or her interest covers the whole property or whether it covers only part of the property. In the latter event, the court would also need to know the extent of the part of the property that is covered by his or her interest or interests. The reason for this is that, in considering whether or not to provide for the expenses and how much provision it should authorise for such expenses, the court should know the precise extent of his or her interest in the property.

[112] Without knowing the extent of a person's interest in the preserved property, the court may have difficulty in establishing how much is available in the preserved property from which it can authorise payment of expenses. The reason why the person is required by section 44(2)(b) to submit to the court "a sworn and full statement of all his or her assets and liabilities" is to enable the court to have a full picture before it determines whether he or she has unpreserved property from which he or she can meet the expenses and, if so, how much provision can reasonably be made from the unpreserved property for such expenses.

[113] Furthermore, section 44(1) authorises the High Court to provide only for "reasonable" living expenses and "reasonable" legal expenses. The High Court would be exceeding its powers if it made an order authorising unreasonable legal expenses or unreasonable living expenses. The determination of what legal expenses or living expenses are reasonable in a particular case depends in part on what assets and liabilities

the person applying for such expenses has. That is part of the reason why the person applying for expenses must disclose all his or her assets and liabilities. Even if he or she does not have unpreserved property, the court needs to have a full picture of his or her assets and liabilities before it can decide on the reasonableness of the expenses that it must authorise for him or her from the preserved property. Needless to say, if all the unpreserved property has to be used to meet the person's liabilities, the court will realise that the unpreserved property is not property from which the person can be expected to get the required expenses. Then, provided both requirements of section 44(2)(a) and (b) are met, the expenses must be provided for from the preserved property.

[114] If the person says to the court that he or she does not have unpreserved property, it means that all the property he or she has is the property that is subject to the preservation order. The fact that he or she tells the court that he or she does not have unpreserved property does not relieve him or her of the section 44(2)(b) obligation to submit to the court a sworn and full statement of all his or her liabilities. This is because, even if he or she does not have unpreserved property from which he or she can meet the expenses in issue, the court must know the full extent of his or her liabilities before it can decide how much of the preserved property should be made available to enable him or her to meet the expenses in issue. The more liabilities he or she has, the more careful the court needs to be in regard to how much should be taken from the preserved property to meet the expenses in question. The fewer the liabilities the person has, the more prepared the court may be to make provision for his or her expenses from the preserved property.

Accordingly, if the person does not furnish the court with all his or her liabilities, the court is precluded by section 44(2) from granting him or her expenses contemplated in section 44(1).

[115] In any event whatever the reason for the requirement that the person disclose all his or her liabilities may be, the fact would remain that the statute makes the disclosure of his or her liabilities a condition that must be met before the court can grant him or her expenses from the preserved property. In this regard it is important to bear in mind that the constitutionality of section 44 has not been challenged in this matter. Once the person has not submitted to the court the liabilities as required by section 44(2)(b), he or she has failed to meet a condition precedent for the grant of the expenses and the court should dismiss the application.

[116] When a High Court is called upon to consider whether to provide for living or legal expenses of a person holding an interest in preserved property under section 44(1) read with section (2), the first matter that it must satisfy itself about is the extent of the preservation order affecting that person. This is necessary in order for the court to establish whether that order covers all the property of that person as at the date when that order was made or whether it left out some property. In turn the significance of establishing this at the outset lies in the fact that section 44(1)(a) requires the court to establish whether or not the person applying for the provision of expenses has property other than the preserved property from which he or she could meet his or her expenses.

[117] If the court finds that the person has unpreserved property, the next question will be whether from the unpreserved property the person can meet the expenses he or she is asking the court to grant him or her from the preserved property. This is important because it is clear from section 44(2)(a) that the court is required to order the provision of legal or living expenses from the preserved property only as a measure of last resort. If the court finds that the person does not have unpreserved property but the court is satisfied that both conditions prescribed in section 44(2)(a) and (b) have been met, the court would have to consider what amount should be provided from the preserved property for the expenses in question in the light of his or her statement of assets and liabilities submitted in compliance with section 44(2)(b). In terms of section 44(1) the amount must be reasonable.

Application of the law to the facts

[118] I have said earlier that, in my view, the first thing that the High Court needs to satisfy itself about when it is called upon to consider whether to make provision for living or legal expenses under section 44(1) is the extent of the preservation order. The court needs to immediately know whether it is dealing with the case of someone whose property is all subject to the preservation order or whether he or she has unpreserved property. If it appears that the preservation order covers all the property that the person had as at the date of the preservation order, the most obvious question that should immediately arise is: how has this person been earning a living from the time the

preservation order was made to date? If the person has been working and earning a salary or if he or she has a business that he or she has been running after the preservation order was made, the court may proceed to consider other relevant factors in the application. However, if the application before the court does not deal with how the person has been earning a living, particularly if the period from the date of the preservation order to the date of the launching of the application before court is long, the court should be concerned about what that person's source of livelihood has been over the period. Once the court has become aware that the person has neither been working nor running any business over the period that would have given him or her an income, the court should, naturally, also ask itself the question: how has this person survived over this period without any income?

[119] If the founding affidavit does not contain any explanation about how the person has survived over a lengthy period, this should constitute "brightly flashing red lights"[89] indicating to the court that the source of that person's livelihood during the period may well have been unpreserved property which he or she has not disclosed to the court and that that property may well be an instrumentality of an offence or may constitute proceeds of unlawful activities. The court should at that stage be alive to the fact that the preservation order that was granted against that person was granted after the court had

[89] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 52.

satisfied itself that there were reasonable grounds that that person's property was an instrumentality of an offence or constituted proceeds of unlawful activities.

[120] If, having considered the affidavits and heard the applicant, the court still remains in serious doubt about whether or not the applicant has unpreserved property from which the living or legal expenses can be provided rather than them being provided from the preserved property, the court cannot possibly be satisfied as required by section 44(2)(a) that the person cannot meet such expenses from his or her unpreserved property. Where the court has such a doubt or where the court is satisfied that the person can meet the expenses from his or her unpreserved property, it cannot authorise the payment of such expenses from the preserved property. The same will apply if the court is satisfied that the person has not made the disclosures contemplated in section 44(2)(b) or has not submitted to that court a statement of all his or her assets and liabilities. In such a case the court is required to dismiss the application.

[121] In this matter the preservation order was granted on 6 March 2006. The terms of the preservation order were so wide that the order covered all of the property which belonged to Mr Elran as at 6 March 2006. Mr Elran says in his affidavit that, prior to the granting of the preservation order, he used the funds standing to his credit in his various bank accounts to support himself, his common law wife and minor child. In the light of this, the question that immediately arises is: how was Mr Elran expected to support himself and his family when the preservation order covered all his property?

[122] The answer to this question is that Mr Elran was expected to apply to the High Court under section 44(1)(a) for an order authorising the payment of his reasonable living expenses. Indeed, that is what Mr Elran did in July 2006. In that application he sought an order authorising not only payment of his living expenses but also his legal expenses as provided for in section 44(1)(b). His application was dismissed by Kumalo AJ in the Johannesburg High Court in 2007. Subsequently, Mr Elran applied for leave to appeal. Although he was granted leave to appeal, Mr Elran later abandoned that appeal. He says that this was because he did not have funds to pay lawyers.

[123] After Mr Elran had abandoned his appeal, he waited until about June 2009 – i.e. three years after all his property had been placed under a preservation order – and then launched in the High Court the application which gave rise to the present proceedings in this Court. Anyone who appreciates that the preservation order granted against Mr Elran covered all his property as at 6 March 2006 and that he had not at any stage in the meantime received any funds or property from the preserved property to support himself and his family, ought to be curious to find out how Mr Elran had made a living over the three years. Why was Mr Elran's application for living and legal expenses not dealt with on an urgent basis or why was it not given priority? Did he ask that it be dealt with on an urgent basis or that it be given priority? These questions are not addressed in Mr Elran's founding affidavit.

[124] One would have expected that in the founding affidavit in the High Court Mr Elran would have taken the Court into his confidence and explained how he had made his living from March 2006 to June 2009. Mr Elran failed to address this question in his founding affidavit. I find this very strange. I cannot accept that anyone in Mr Elran's position would not know that he should explain to the Court how he had made a living over such a long period of time when, on his version, he had no access to his only property, namely, the preserved property. A person finding himself in Mr Elran's position would be particularly alive to the need to explain the source of his livelihood. This is so because the mere granting of a preservation order meant that the High Court was satisfied that there were reasonable grounds for believing that he had earned his property through crime.

[125] One would have expected that when, in 2009, Mr Elran brought the application for legal expenses which gave rise to this appeal, he would also apply at the same time for an order authorising the payment of his living expenses. However, Mr Elran did not ask for his living expenses. Of course, this must have been a decision that he consciously took. This means that, after he had lived for three years without access to his preserved property, Mr Elran elected that he should be paid legal expenses and not living expenses from the preserved property. In this regard it is important to note that his attitude is that Kumalo AJ wrongly dismissed his application for living and legal expenses in 2007.

[126] The previous application that Mr Elran had brought before the High Court was an application for his living and legal expenses from the preserved property. I have referred above to the fact that Mr Elran did not see fit to explain in his founding affidavit what the source of his livelihood was for the period March 2006 to June 2009. He also did not take the High Court into his confidence and explain why he did not include an application for an order authorising payment of living expenses at the same time as he was applying for an order authorising payment of legal expenses.

[127] Mr Elran's election not to apply for living expenses was even stranger because in the High Court he was the one who complained in his replying affidavit that since March 2006 he had not been able to pay his living and legal expenses and had been forced to live off loans and charity from his friends and family. I would not accept that Mr Elran did not realise that there was a need to explain to the Court why he was not applying for living expenses at the same time that he was applying for legal expenses. Mr Elran should have explained all this because otherwise anyone aware of the width and effect of the preservation order against him is likely to conclude that he had a source of livelihood that he had failed to disclose to the Court on which he had supported himself and his family from March 2006 to June 2009. One would also be driven to the conclusion that Mr Elran's source of livelihood was illegal and that is why he did not disclose it to the Court. If that conclusion was reached, the result would be that the Court could not be satisfied that Mr Elran could not meet his legal expenses from his unpreserved property

and it would then dismiss his application because the condition prescribed in section 44(2)(a) would not have been met.

[128] If Mr Elran's application to the High Court that gave rise to the present appeal were to be decided on the basis of his case as set out in his founding affidavit, it fell to be dismissed on the ground that, in the above circumstances, the Court could not be satisfied that Mr Elran had no unpreserved property from which he could meet his legal expenses and, therefore, the condition in section 44(2)(a) was not met. However, after the NDPP had taken the point in its answering affidavit that Mr Elran must have had or did have property (other than the preserved property) which he had not disclosed, Mr Elran stated in his replying affidavit that he did not have any property other than the preserved property and that he lived off charity and loans from family and friends. Except for the loan of R60 000,00 that Mr Elran said he received from his mother, he did not disclose who precisely had given him loans, how much the loans were, when he received them nor did he explain the terms and conditions of such loans. Mr Elran also did not disclose who had made donations to him, the amounts of the donations and when the donations had been made. He just made a bald statement that over the period he had depended on donations and loans from family and friends.

[129] The first question that arises with regard to the explanation that Mr Elran gave in reply is whether or not it should have been in the founding affidavit. It should have been in the founding affidavit because the question of how Mr Elran had earned his living in

the meantime was relevant to satisfying the Court that he had no unpreserved property from which he could meet his legal expenses.[90] In this regard it must be remembered that in motion proceedings an applicant must make out his or her case in the founding papers and not in reply.[91] The Full Court took the view that the NDPP should have applied to strike out that part of Mr Elran's reply and, since the NDPP failed to do so, the Court was entitled to take that part of the reply into account in deciding the matter.

[130] In my view the Full Court erred in saying that it was open to the NDPP to apply to strike out Mr Elran's reply that he had lived off loans and donations. The NDPP could not have shown that all the requirements for an application to strike out were present. Applications to strike out are governed by Rule 23(2) of the Uniform Rules of Court. Rule 23(2) reads:

> "Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule (6), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted."

[131] Firstly, Rule 23(2) requires that the matter that is sought to be struck out should be shown to be irrelevant, scandalous or vexatious. The statement in question was neither scandalous nor vexatious. Indeed, it was not irrelevant either. It was highly relevant but

[90] Section 44(2)(a).

[91] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B.

should have been included in the founding affidavit and not in reply. Secondly, another requirement for a striking out order is that an applicant for such an order must show that he or she will be prejudiced in the conduct of his or her case or defence by the presence of such matter in the affidavits or pleadings. The NDPP could not satisfy this requirement because the Court was not entitled to take into account a statement made in reply which should have been made in the founding affidavit. Accordingly, I am of the view that the Full Court was not entitled to take that statement into account in deciding the matter.

[132] If the statement in question is not taken into account in deciding the matter, one is left with a founding affidavit that is silent on a very critical aspect of the matter that would have rendered the Court unable to be satisfied as to the matter in section 44(2)(a). The result would be that the Court could not have been satisfied as to the condition in section 44(2)(a) and the High Court was precluded from making the order that it made.

[133] Even if the Full Court was entitled to take the statement in question into account, it could still not have been satisfied that Mr Elran did not have unpreserved property from which he could meet his legal expenses. Why did someone who genuinely believed that a preservation order had been wrongly granted against him which denied him access to a lot of his money choose not to apply for an order for living expenses but lived off loans and charity? Why would such a person, when he has lawyers who are prepared to represent him in bringing an application for an order authorising payment of legal

expenses not instruct them to include in the application an order authorising payment of his living expenses? I have immense difficulty in understanding the logic of his election. How can anybody who has preserved property which he genuinely believes was wrongly placed under a preservation order prefer to depend on donations and loans from other people for a living when he can, by an order of court, obtain payment of his living expenses from his preserved property? In fact all he needs to do to obtain an order of court authorising payment of his living expenses from the preserved property is to apply to court for such an order and meet the two conditions prescribed by section 44(2)(a) and (b). When a person has nothing to hide, these conditions are very easy to meet.

[134] Another question that arises when one considers Mr Elran's election is: did Mr Elran disclose to those he approached for donations and loans that the law gives him a right to ask the High Court to authorise payment of his living expenses from his preserved property but that he had elected not to approach the Court for such relief? I doubt that he did. It seems to me that the most obvious and logical thing to do for a person whose property has been placed under a preservation order and who has no other property he can use to earn a living is to apply to the High Court which made the preservation order and seek an order authorising payment of his living expenses.

[135] I find it difficult to understand why such a person would elect to live like a beggar when he has his own property from which he can earn a living. Such conduct is so illogical that it is difficult to resist the temptation to think that the source of such person's

livelihood is illegitimate and probably illegal. It may well be that Mr Elran lived off loans and charity but, if those loans and charity were legitimate and above board, let him disclose those who provided him with loans, how much the loans were and when they were given. In my view, if he brings an application for living or legal expenses but fails to meet one or both of the conditions prescribed in section 44(2)(a) and (b), he is not precluded from later on bringing another similar application that complies with the statute. Accordingly, it is not as if, once his application has been dismissed for failure to meet the conditions prescribed in section 44(2)(a) and (b), he will never qualify for such expenses if later on he is able to meet the prescribed conditions.

[136] In any event, donations constitute assets in one's estate. Accordingly, in so far as Mr Elran received donations on which he depended for a living between March 2006 and June 2009, those donations would have fallen within the definition of the word "property" in section 1 of POCA and, therefore, constituted unpreserved property. The donations received by Mr Elran would also have constituted assets and Mr Elran should have disclosed them in the statement required by section 44(2)(b). He did not disclose them and, therefore, did not meet the conditions prescribed by section 44(2)(b). Furthermore, the loans which Mr Elran says he received were liabilities to his estate and he should have disclosed them in the statement of liabilities required by section 44(2)(b). He failed to do so and, therefore, did not meet the condition prescribed by section 44(2)(b).

[137] In the result, on the strength of Mr Elran's founding affidavit read with or without the statement he includes in his replying affidavit which he should have included in his founding affidavit, the Court should not have been satisfied, as required by section 44(2)(b), that Mr Elran could not meet his legal expenses from his unpreserved property. The Court should also not have been satisfied that Mr Elran had submitted to the Court a full statement of all his assets and liabilities as required by section 44(2)(b). Accordingly, the Court of first instance ought to have dismissed Mr Elran's application on the grounds that it was not satisfied as required by section 44(2)(a) and (b). The Full Court ought to have upheld the appeal against the order of the Court of first instance.

[138] In the result I agree with the order proposed by Cameron J.

For the Applicant:	Advocate A E Bham SC and Advocate R Keightley instructed by the State Attorney.
For the Respondent:	Advocate N P G Redman and Advocate E Fasser instructed by I Mabunda Attorneys.